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REGULATION OF FOREIGN INVESTMENTS IN AFRICA

PART I

Systematic presentation by country

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This report has been prepared in accordance with the work programme approved by the Committee on Economic Co-operation among Developing Countries at its third session (resolution 2 (III), para. 2 a) ii), and at its fifth session (resolution 4 ((V), para. 4 b) ii)).

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INTRODUCTION

1. This addendum has been prepared at the request of the United Nations Development Programme as part of the project RAF/88/006, on economic and technical co-operation between African and Latin American countries. It is a sequel to UNCTAD/ST/ECDC/30 (Part I) and UNCTAD/ST/ECDC/30/Add. 1 (Part I), which cover the regulations in force in 37 African countries (Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Ethiopia, Gambia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Mauritania, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Swaziland, Togo, Uganda, United Republic of Tanzania, Zaire, Zambia and Zimbabwe.

2. This report covers the regulations in force in 7 countries of sub-Saharan Africa (Guinea, Guinea-Bissau, Equatorial Guinea, Mozambique, Sao-Tome-and-Principe, Senegal and Togo). Following the publication of UNCTAD/ST/ECDC/30, Guinea, Senegal and Togo enacted new investment regulations, which are described in this report. Paragraphs 148-153, 206-223, 227-229 and 230-245 of UNCTAD/ST/ECDC/30 are therefore amended in the light of the new regulations.

3. The topics dealt with in this volume are the same as in Volumes I, II and III, published in 1986 and 1987 (1): objectives, definitions and scope, general conditions and guarantees, monitoring arrangements and sanctions, settlement of disputes, and reference to other provisions. This report is confined to s systematic presentation by country of the legal instruments which govern foreign investment, following a specific plan and specifying the article or chapter in question when reference is made to a legislative or statutory text. No mention is made in the report of the guarantee systems established under international agreements concluded between States which export and States which receive investments; or of specific agreements concluded between investors or enterprises and recipient States. Nor does the report contain any evaluation of the practical applications of investment regimes.

4. The publication of this fourth volume on the regulation of foreign investment in Africa completes the coverage of all sub-Saharan African countries. This enables the Secretariat of UNCTAD to produce a descriptive inventory of the regulations for foreign investment in those countries. This inventory is part of a programme of work on issues relating to co-operation among enterprises: the promotion of investment flows among developing countries; the promotion of joint investments; the promotion of a variety of co-operation arrangements among enterprises in these countries; and the dissemination of legal information concerning joint investment and co-enterprises, investment guarantee arrangements, bilateral investment agreements, international foreign trading enterprises, bilateral trade agreements and regulations for clearance transactions. (2).

5. Collections of laws and regulations, official gazettes and the publications of administrative authorities responsible for investment were the basic sources for this study.

6. In addition to the document on the regulation of foreign investment in Africa, the Secretariat has published similar studies on developing countries in the Arab region (3) and in Asia (4). In due course, further studies will cover the Latin American and Caribbean regions. It is inevitable, in studies of this kind, that a certain amount of legal information will be lacking. From time to time, therefore, the Secretariat will publish addenda containing amendments and revisions. The legislative texts on foreign investment in Africa which are referred to in the bibliography of this report, as well as the previous volumes on the other countries of sub-Saharan Africa, the countries of the Arab region and the developing countries of Asia, can be obtained on written request to the Division of Economic Co-operation among Developing Countries of UNCTAD, Palais des Nations, 1211 Geneva 10, Switzerland.

A. GUINEA

7. Order 001 PRG/87 of 3 January 1987 on the Investment Code supersedes the 1980 Investment Code (5). The new Code seeks to define the framework and the conditions for investment operations in Guinea, the guarantees available to investors, and the advantages granted to those making a significant contribution towards the priority goals of the national programme for economic and social development. This Code lays stress on the climate of free enterprise.

1. Definitions

8. An "enterprise" within the meaning of the Code is an economic entity engaged in commercial, industrial, mining, agricultural or service activities, by means of a head office, a subsidiary or a company lawfully established in Guinea. An "enterprise lawfully established in Guinea" is an enterprise which satisfies existing Guinean laws and regulations; a "mixed economy company" is any company in which the State holds at least 25% of the share capital. These enterprises have the same rights and obligations as private enterprises.

9. "Capital investment from abroad", according to the Code, consists of contributions of currency or of new capital goods obtained abroad to any enterprise lawfully established in Guinea; reinvested company profits which could have been transferred abroad; and the buying-up of existing enterprises, or the purchase of shares in them, by means of currency contributions (Art. 3).

2. Scope

10. The Code applies to the following branches of the economy: mining industries; industries engaged in mechanical or chemical preparation or processing; industries manufacturing and assembling consumer items; agricultural enterprises; public construction enterprises, and real estate or hotel enterprises. The Code applies to companies and subsidiaries which are lawfully established in Guinea (Art. 2.3). The enterprises not covered by the Code are those engaged in sales activities, defined as the resale of purchased products, and companies engaged in the prospection and extraction of minerals and hydrocarbons.

3. General guarantees

11. The following guarantees are provided by the Code: the free transfer, subject to exchange control regulations, of capital consisting of investment income, income derived from the liquidation of an investment or from compensation following expropriation in the public interest (Art. 3); public enterprises are to have the same rights and obligations as private enterprises, subject to the overriding public interest (Art. 4); there shall be no expropriation or nationalization, except in the public interest and subject to fair compensation (Art. 5); and nationals and foreigners are to be accorded equal treatment, subject to reciprocal arrangements on the part of the foreign State (Arts. 6 and 7).

4. Special investment regimes

12. The Code establishes four special regimes: the regime for small and medium-sized enterprises; the regime for exporting enterprises; the regime for enterprises making use of indigenous natural resources and raw materials; and the regime for enterprises established in economically less-developed areas. These reimes offer a number of tax and customs advantages; in return, the enterprises undertake to discharge certain obligations.

(a) Conditions

13. In Guinea, any person planning to set up a new enterprise, or to expand an existing one, may enjoy advantages offered under one or more of the special regimes, if the activity or its expansion contribute to the achievement of one or more of the priority objectives of the National Programme of Economic and Social Development. These priority objectives are as follows: to promote small and medium-sized enterprises in Guinea; to develop non-traditional exports; to draw upon indigenous natural resources and raw materials by processing them in Guinea; and to establish business activities in economically less-developed areas. These objectives are framed to ensure the creation of jobs for nationals and the harmonious development of the economy (Art. 8).

14. The advantages of one of the special regimes may also be granted to any enterprise which fulfils two further conditions: capital investment financing to at least 20%, in the case of Guinean small and medium-sized enterprises, and 33% in other cases (Art. 10); and prior communication of their employment plans to the National Investment Committee (Art. 11).

15. To be regarded as a "Guinean small or medium-sized enterprise" an enterprise must fulfil the following conditions: (a) that the value of the assets used to conduct the business (not including the site value or the working capital) is between 15 and 300 million Guinean francs (6); (b) that Guinean nationals hold a majority of the shares and have a controlling influence in the management; (c) that there is sufficient permanent employment for at least five workers; (d) that regular accounts are kept. Co-operative enterprises fulfilling the same conditions are also regarded as "small and medium-sized enterprises" (Art. 12).

16. An enterprise producing goods or services is regarded as an "exporting enterprise" if its exports are non-traditional and yield a foreign currency income of over 22% of the total turnover of the enterprise in a fiscal year. Non-traditional exports are deemed to be exports of goods and services of Guinean origin, except for exports of bauxite and its by-products in the form of gold, diamonds and iron-ores (Art. 13).

17. A processing or service enterprise is regarded as a user of indigenous natural resources and raw materials if the value of its consumption of intermediate goods of Guinean origin exceeds 70% of the total figure for consumption of intermediate goods by the enterprise during any one year (Art. 14).

18. A production enterprise is regarded as being established in an economically less-developed area if at least 90% of its staff work at locations outside Conakry, and if its main centre of activity is in one of these locations (Art. 15).

(b) General advantages

19. Exemption for a two-year period, coinciding with the period of the initial investment, from import duties and taxes, including turnover tax, but excluding customs registration taxes. Taxable profits for the first five years are deducted, the deduction being based on the minimum monthly wage. Exemption from apprenticeship tax and from the flat-rate wages contribution for a period of five fiscal years after start-up, and a 50% reduction in both taxes for the following three years (Art. 16).

(c) Special advantages

20. The advantages associated with the regime for small and medium-sized enterprises in Guinea include: exemption for ten years from payment of the minimum flat-rate tax; the tax on industrial and trading profits is payable for 5 years at the preferential rate granted to home-based craft workers and those working direct to customers (Art. 17).

21. For five fiscal years after start-up, exporting enterprises receive a tax rebate on industrial and trading profits equivalent to the proportion of the export turnover to total business turnover in any one fiscal year. The rebate may not, however, exceed 60% of the profits. (Art. 18).

22. For the first five fiscal years after start-up, enterprises which make use of indigenous natural resources and raw materials are granted tax relief on industrial and trading profits equivalent to 20% of their consumption of intermediate goods of Guinean origin (Art. 19).

23. The advantages associated with the regime for enterprises established in economically less-developed areas include: full tax relief for five years; a rebate of one-third of the turnover tax levied on the output of goods or services by the enterprise during the first five fiscal years after start-up (Art. 20).

(d) Authorization procedure

24. A natural or legal person wishing to benefit from the advantages granted under the special regimes must file an application for authorization with the general secretariat of the National Investment Committee. The supporting documentation must contain the following information: the finance and investment plan; the trading account; the production plan; the employment and training programme; and the export plan. The file shall also include a letter from the promoters or partners of the enterprise, specifying the special regime or regimes for which authorization is sought, and summarizing the facts in the file which show that the project meets all the conditions listed in the Code (Art. 25).

5. Administrative authority

25. The National Investment Committee was set up through Decree 001 of 3 January 1987, which instituted the Investment Code. The Committee is chaired by the Minister for Planning and International Co-operation, or his representative. Its responsibilities include implementing the investment code, processing applications for authorization, and promoting investment in the country.

6. Sanctions and dispute settlement

26. In the event of any serious or sustained violation by an enterprise of its obligations, as specified in the Code or assumed on authorization of the project, the advantages of the special regime may be withdrawn, wholly or in part, from the enterprise concerned. (Art. 27).

27. Disputes arising from the interpretation or application of the Code are settled by the competent courts of Guinea. However, disputes arising between the State of Guinea and foreign nationals in relation to the application or interpretation of the Code shall, except where otherwise agreed by the parties, be resolved by arbitration (Art. 28).

B. GUINEA-BISSAU

28. The Decree (Act No. 2/85) of 13 June 1985 instituted a new regime for foreign investment. The purpose of this regime is to promote foreign investment, and to channel investment towards priority sectors of the national economy. The regime is governed by Decrees Nos. 25E and 25F of 13 June 1985.

1. Definitions

29. "Foreign direct investment" is understood to mean all contributions from abroad by natural or legal persons neither domiciled nor resident in Guinea-Bissau, with a view to carrying out commercial activities, setting up new enterprises or joining with existing enterprises, acquiring a shareholding in an enterprise or ownership of a company, and forming shareholdings or partnerships in a company with third parties. The investment may be in the form of convertible currency, capital goods, plant or materials imported for investment purposes, or the transfer of technology (Act 2/85, Art. 3, and Decree 25 E/85, Art. 1). "Re-investment" is understood to mean the full or partial use of exportable realized profits (Act 25/85, Art. 3).

2. Scope

30. The regime applies to foreign natural and legal persons lawfully established in Guinea-Bissau for investment purposes. The special advantages of the regime are granted for investments in the following areas: agricultural projects; projects requiring significant amounts of manpower; projects which involve the processing of national resources; projects which achieve significant added value; projects which have a marked repercussion on the balance of payments; and projects requiring few or no outside credit facilities (Act 2/85, Art. 4).

31. The regime does not apply to investments in fishery areas or areas of oil-production, or to the extractive industries, to which special legislation is applicable (Art. 29).

3. General conditions

32. Foreign investment in Guinea-Bissau must have regard to: the economic and social development targets of the country, and the promotion of national wellbeing; the development strategy laid down by the State; the goals defined in the economic and social development plans; and the legislation in force (Art. 2).

33. Enterprises with foreign shareholders must employ nationals, and must ensure that they have the necessary training. If there are insufficient qualified workers within the country, enterprises may recruit foreign staff, but must carry out a programme for the training of nationals (Art. 24).

34. Foreign enterprises must use accounting methods approved by the Ministry of Finance. They must refrain from activities likely to disrupt the activities of local residents, and must adopt specific measures to combat pollution. (Art. 25).

4. General guarantees

35. The State guarantees the safety and protection of all property acquired through a foreign investment effected according to the law (Art. 14). Property may not be nationalized or expropriated except in the national interest; in that event, the investor will be compensated (Art. 15).

36. The State also guarantees the transfer abroad, on an annual basis, of dividends, earnings and profits, after deduction of tax, if the sum to be transferred is covered by the net balance of sales and expenditure by the enterprise, and if the enterprise has satisfied the conditions under which the investment was authorized (Art. 16). If the former condition is not met, transfer will be postponed for a maximum of three years (Art. 17). It is also permissible to export sums realized from sales or from liquidation of the foreign investment, including appreciation, after a lapse of three years, subject to the payment of tax (Art. 19). In order to guarantee the transfer of dividends and profits, the State may negotiate for the setting up of special funds abroad, and/or the National Bank of Guinea may authorize the opening of special accounts abroad, to which may be credited receipts from exports made by enterprises with foreign capital (Art. 18).

37. Enterprises having a foreign shareholding in Guinea-Bissau companies shall retain a preferential right if the foreign shareholding is wound up or liquidated (Art. 20). These enterprises may, if so authorized by the Ministry of Finance and the National Bank, receive domestic loans to finance their operations (Art. 21).

5. Advantages

38. The regime provides the following advantages: (1) Tax relief, for a period of three to eight years, on returns on investment, both distributed profits and dividends, in proportion to the foreign shareholding; (b) exemption from import duties on goods required for the planning and execution of investment projects, and on materials for the production of goods intended for export. The same relief will be available on similar goods and services of domestic origin which are available on the local market (Art. 4).

39. The Council of Ministers may grant preferential terms for foreign investment projects of special importance to the economy and to national development (Art. 28).

6. Authorization procedure

40. Foreign investment in Guinea-Bissau is subject to authorization and registration (Art. 5). Projects will be accepted according to certain criteria: whether the project is compatible with the country's development targets; its technical, economic, and financial viability; the availability and use made of national resources; the siting of the project; the amount of employment generated for nationals; the technology used and the arrangements for its transfer; and the direct effects on the economy (Act 2/85, Art. 6; Decree 25 E/85, Art. 3).

41. An application for authorization of an investment project must be accompanied by information about the project, and be addressed to the appropriate Ministry. The Ministry in question will seek the views of the Ministry of Finance, the National Bank and the Ministry of Economic Co-ordination, Planning and International Co-operation. The authorization will be issued in the form of an official document approved by the Council of Ministers, stating the conditions set and the advantages granted (Act 2/85, Arts. 7 and 9, and Decree 25, Art. 4).

42. Foreign capital entering the country must be authorized by the Ministry of Finance. Similarly, exchange operations relating to foreign investments must be effected through the National Bank (Act 2/85, Art. 12, and Decree 25 E, Art. 1).

7. Administrative authority

43. The agency for co-ordinating and promoting foreign investment is the Ministry for Economic Co-ordination, Planning and International Co-operation (Decree 25 E/85, Art. 9).

8. Sanctions and dispute settlement

44. If the foreign investor fails to comply with its obligations, the investment authorization may be revoked and the appropriate sanctions applied (Art. 23).

45. Disputes arising from the application of these legal provisions will be resolved jointly by the Ministers of Finance and Economic Co-ordination and the Governor of the National Bank.

C. EQUATORIAL GUINEA

46. The Decree (Act No. 7) of 1 June 1985 establishes a regime for investment in Equatorial Guinea. The purpose of the regime is to encourage the economic development of the country and to promote investment, especially in the private sector. This Act introduces two types of regime: an ordinary regime and special regimes. The Act has been drafted to take account of the criteria defined in the common Investment Code for CACEU countries.

1. Definitions

47. The term "foreign enterprise" is applied to any enterprise which, because of its capital investment, is controlled by foreign nationals.

2. Scope

48. The regime applies, in general, to any enterprise wishing to start a new activity or to develop an existing activity, except for commercial activities and those which require special authorization on public interest grounds (Art. 1).

3. General guarantees

49. The principal guarantees enshrined in the Act are as follows: the transfer of capital, profits, income from liquidation of investments, dividends, loans and interest, subject to exchange controls; equality of treatment for nationals and foreigners; and respect for acquired rights (Arts. 2 and 3).

4. Investment regimes

50. The Act establishes two types of regime: the ordinary regime and the special regimes. There are several kinds of special regimes: framework regimes A and B, applying to enterprises whose activities are confined to the territory of Equatorial Guinea; and framework regimes C and D, applicable to enterprises whose markets are situated in any member State of CACEU.

51. The ordinary regime applies to enterprises not covered by any special regime. It consists of the general guarantees and conditions prescribed in the Act, together with the other ordinary provisions applicable to enterprises.

(a) Special regimes

(1) Authorization procedure and conditions

52. A special regime is available to any enterprise operating in one of e following economic sectors: agriculture; animal husbandry; fisheries; industry in general; energy production; tourism; and oil extraction (Art. 12).

53. Every application for authorization must be addressed to the Ministry of Industry, Trade and Business Promotion. The application must specify the regime applied for, and must be accompanied by the necessary supporting documentation. The application is transmitted for consideration to the Investment Committee. If a favourable opinion is received from the Minister for Planning and Economic Development, regimes A and B are granted through a

decree adopted by the Council of Ministers. Regimes C and D are granted through a decision of the Management Committee of CACEU. The authorization will specify the type of regime granted, the activities to which the authorization applies, the obligations of the enterprise and the arrangements for settling disputes.

54. In considering projects, particular attention is paid to the following criteria: the extent to which the project contributes to the achievement of the country's economic and social development plans; how many jobs it will create; the role played by nationals in capital formation; the use of local raw materials; respect for the environment; whether the head office of the enterprise is located in a member country of CACEU; and whether the project has a minimum programme for producer goods.

(ii) A and B regimes

55. These regimes apply mainly to export enterprises, to enterprises whose markets are confined to Equatorial Guinea and to industrial projects which, although oriented to the domestic market, have a production operation in another CACEU country.

56. During the installation phase, enterprises covered by the A regime pay only 5% of the global rate of import duties and taxes on plant and equipment required for production and processing. These enterprises are also exempt from import duties on raw materials and on products intended for manufacture which are not re-usable; from territorial taxes on urban property, for a period of 10 years; from corporation tax and patent fees, for 10 years; from turnover tax; and from sales tax on products manufactured in Equatorial Guinea.

57. Enterprises covered by the B regime receive, in addition to the advantages of the A regime, exemption from import duties and taxes on equipment required for production purposes; exemption from territorial taxes on urban property and lots, for a 10-year period. The A and B regimes also offer an establishment agreement with the State.

(iii) C and D regimes

58. The C and D regimes apply to enterprises operating in two or more CACEU countries. The C regime provides the following advantages: a reduced rate, during the installation phase, of 5% of import duties and taxes on plant and machinery; the application of the single tax system in force in the CACEU; and the advantages available under the A and B regimes.

59. Enterprises accepted for the D regime enjoy the advantages of the C regime. Enterprises of key importance to the country's development, and which attract exceptional levels of investment, may also be granted tax equalization.

5. Administrative authority, sanctions and dispute settlement

60. The Investments Committee is the body responsible for promoting, co-ordinating and monitoring investments.

61. According to the Act, the benefits of the special regime may be withdrawn or suspended if enterprises fail to comply with their obligations. Enterprises may lodge an appeal within 60 days with the administrative courts.

62. The Act establishes an arbitration procedure to settle disputes arising in connection with the provisions of the establishment convention. The convention provides, however, that if the majority of the original share capital is foreign-owned, the chosen procedure may be arbitration. For the A and B regimes, the authorization decrees specify the particular arrangements for for international arbitration.

D. MOZAMBIQUE

63. Act No. 4/84 of 18 August 1984 institutes a legal framework to govern foreign investment in Mozambique. Decrees Nos. 8/87 and 9/87 of 30 January 1987, and ministerial resolution No. 87 of June 1987, govern the implementation of Act No. 4/84.

1. Definitions

64. For the purposes of the Act, a "foreign investor" is meant as any natural or legal person neither domiciled in nor resident in Mozambique, who is the owner of a direct foreign investment; "foreign direct investment" means any profit-making investment from abroad; "reinvestment" means any use made in an enterprise of all or part of the exportable profits; "enterprise" means an economic activity carried on by, or in partnership with, a foreign investor which may constitute a shareholding in either an existing or a future enterprise; "exportable profit" is that portion of a profit or dividend which is transferable under the terms of the authorization after deduction of tax on amortization, reserves and income from liquidation; and "re-exportable capital" is the property or rights of which the investment consists, calculated as the value on the liquidation or winding-up, or the income realized on extinction of such rights or property, after payment of taxes (Art. 1).

2. Scope

65. Investment is permitted in all sectors of the economy, except those reserved for the sole ownership or control of the State. Activities likely to cause pollution or contamination dangerous to public health may be restricted and regulated (Art. 9). Except by ministerial agreement, no investment may be made in fisheries, oil production or the extractive industry.

66. The Government may decide to establish on the national territory free zones to which special conditions will apply. There are as yet no zones of this kind (Art. 27).

3. General conditions

67. Investment projects must observe the guidelines of economic policy, the legislation in force and the terms of establishment laid down in the investment authorization (Art. 2). Investment projects must also contribute to economic and social development, whether by increasing exports, achieving import substitution, improving the balance of payments, promoting technological development, increasing productivity, increasing employment opportunities, or providing skills training for nationals (Art. 3).

68. All foreign investments for the purpose of creating or expanding enterprises must take the form of a partnership with Mozambican private or public enterprises, or form a wholly foreign-owned enterprise geared to the foreign market (Art. 5). Entrepreneurs will be allocated Mozambican workers who possess the requisite skills; if none are available, they will be permitted to recruit foreign workers.

69. For the purpose of the regime of guarantees and advantages available under the law, direct foreign investments are considered to be those with a value of not less than 10 million meticais (7) in freely-convertible currency (Decree 8/87, Art. 4).

4. General guarantees

70. The State guarantees the security and legal protection of the property and rights held in the form of investments, except where the national interest dictates otherwise, and subject to fair compensation (Arts. 15 and 16).

71. The State permits the transfer abroad of export profits, re-exportable capital and debt repayments. Profits may be transferred within 90 days after submission of a request for transfer to the Ministry of Finance. The transfer of re-exportable funds will be staggered, in order to avoid adverse effects on the balance of payments. The transfer will be effected in the convertible currency in which the investment was made (Act 4/84, Art. 17, Decree 8/8, Art. 70).

5. Authorization procedure

72. Every foreign investment must be authorized. Applications must be submitted, in the prescribed form, to the Investment Promotion Committee, which transmits them to the Evaluation Committee. Authorization is then issued by the Council of Ministers within 90 days of the submission of the application (Act, Arts. 7, 10, 11; Decree, Arts. 10, 11, 12). Where the investment does not exceed 500 million meticais, the National Planning Committee has authority to approve it (Decree 9/87, Art. 1).

73. Foreign investors must give notice of their authorization to the Ministry of Finance, and must complete the legal formalities for registration. The investment project must begin within 80 days of the authorization, and the investor must furnish information on its progress to the Ministry of Trade and to the Bank of Mozambique, the Ministry of Finance and the Investment Promotion Committee.

74. Investments will be authorized chiefly according to the following criteria: whether the project complies with the priority objectives of national economic development; the technical, economic and financial viability of the project; its positive impact on the balance of payments; the use made of natural resources; the siting of the project; the extent to which nationals are employed; and the technology used and the provision for its transfer (Art. 8).

6. Advantages

75. The following are the main advantages granted to authorized foreign investors: (a) exemption from payment of customs duties on the import of goods required for the execution of the project, and on the import of raw materials and accessories for the production of goods for export (Art. 19); (b) exemption from tax on salaries and on other payments to foreign technicians recruited to execute the project (Art. 20); (c) exemption from tax, for a period of two to ten years, on the output of the enterprise, in a ratio equal to the portion of direct foreign investment, and on profits or dividends paid to the foreign investor (Art. 21).

76. In addition, the total sum disbursed for the training of Mozambican workers, multiplied by three, will be deducted from the tax on output (Art. 22). Enterprises set up as a result of foreign direct investment may receive a loan from the State (Art. 25). The State may grant preferential terms for certain types of investment of special importance to the economy and to national development (Art. 28).

7. Administrative authority

77. The Foreign Investment Promotion Committee was set up through Ministerial Resolution No. 87 of June 1987, in association with the Ministry of Planning. The Committee is the body responsible for stimulating, disseminating and proposing measures to encourage foreign investment in the country.

8. Sanctions and dispute settlement

78. If the enterprise fails to comply with its obligations, the authorization may be withdrawn or suspended. Complaints should be addressed to the Foreign Investment Promotion Committee, which will transmit them to the organization concerned. If no reply is received within 20 days, the Committee will transmit the request to the Planning Minister.

79. Disputes arising from the interpretation and execution of the law on foreign investment will be resolved through arbitration, under the terms laid down in the decree of authorization. If no agreement is reached on the membership of the arbitral panel, the International Chamber of Commerce in Paris shall have jurisdiction to reach an arbitral decision, which shall be final and binding upon the parties (Art. 26).

E. SAO TOME-AND-PRINCIPE

80. In April 1986 Sao Tome-and-Principe promulgated an Investment Code for the purpose of stimulating the production of goods and services in the country. The Code defines the terms and conditions under which national or foreign enterprises and/or institutions may operate in sectors of the economy. It decides which guarantees and advantages are to be offered to enterprises, and which legal regimes will apply to their formation and their operations.

1. Scope

81. The Investment Code applies to enterprises in agriculture, animal husbandry, forestry, fishing, industry and transport, which are engaged in the following areas of activity: the production, processing and assembly of manufactured products; the processing, conservation, treatment and storage of products; the production of alternative energy supplies; the reconditioning, assembly and maintenance of plant, buildings and public works; tourism; public works and services; and the transport of goods and passengers. Small and medium-sized enterprises investing in priority areas may also enjoy the advantages provided by the Code, even if their activities are outside the economic sectors mentioned above (Art. 6).

2. General guarantees

82. The principal guarantees enshrined in the Code are: protection for the rights acquired by lawfully established enterprises; the right to transfer profits and dividends derived from their operations, and the income derived from the liquidation of their investments, if the investments have been financed with convertible currency (Arts. 21 and 22).

3. Investment regimes

83. The Code establishes four investment regimes: regime A, or the general regime; regime B, or the regime for small and medium-sized enterprises; regime C, or the regime for priority categories of investment; and regime D, or the establishment convention regime. These regimes provide a number of advantages, mainly in the form of exemptions from tax and customs duties; in return, the enterprises undertake to discharge certain obligations.

(a) General advantages

84. Depending on the nature and size of their investments, enterprises are granted exemption from customs duties on exports, by way of an incentive (Art. 8).

(b) Regime A, the general regime

85. This regime is applicable to enterprises and institutions investing in projects of a kind ineligible for any of the other regimes.

86. Projects must be authorized. Applications for authorization must be submitted to the State central planning authority. Projects are evaluated by the State central authority for economic management, and by the appropriate Ministry for the sector concerned. A decision is then made by the Council of Ministers (Arts. 9 and 10).

87. Apart from the general guarantees provided in the Code, enterprises enjoy the following advantages: a waiver or reduction of territorial tax on rural and/or urban property, and of the industrial levy and its various additional charges; a waiver or reduction of the transfer taxes payable on the purchase of buildings required for the enterprise; a waiver or reduction of customs duties and other taxes payable on imported capital goods or raw materials intended for the production of exportable goods (Art. 11).

(c) Regime B, for small and medium-sized enterprises

88. To receive the benefits of this regime, enterprises must be legally constituted, hold shares - to any amount - in an enterprise belonging to nationals, have an investment programme of less than 50 million dobras (8), keep regular accounts, provide staff training and employ at least 20 people (Art. 12).

89. Enterprises which fulfil the conditions for regime B may be granted all the advantages of regime A, plus the following: the grant - free of charge or otherwise - of the land required for their installations, for a fixed period; exemption for five years from customs duties and taxes on imported spare parts for plant and machinery required for setting up, converting or mounting the investment project; and bank loans on special terms (Art. 13). If the investment project is located outside the industrial zones of Sao Tome and Neves, the relief from tax and customs duties under the regime may be extended from five to eight years (Art. 14).

(d) Regime C, for priority investments

90. To receive the benefit of this regime, enterprises must fulfil the following conditions: be undertaking a conversion or extension in priority sectors, as defined by the Government; exceed an aggregate investment figure of 80 million dobras; be using local raw materials and, if possible, local supplies and services; respect the environment; use techniques which enable them to deploy substantial numbers of local workers; provide staff training; create "significant" added value; be manufacturing components for other local industrial manufacturers; export at least 60% of their production; and have a positive impact on the balance of payments (Art. 15).

91. The advantages offered to enterprises under this regime are as follows: all the advantages of the A regime; exemption from income tax for threee to five years, if the investor sets up business in the industrial zone of Sao Tome and Neves; exemption for a maximum of 7 years from tax on urban or rural property, and from the industrial levy with its supplementary charges; and exemption for a maximum of 10 years from the above taxes, where the investment project is sited in the island of Principe.

92. In addition, during the initial phase enterprises are granted exemption from customs duties and taxes on imported spare parts for machinery, to a maximum of 10% of the purchase price of the machinery, and from customs duties and taxes on imported industrial, commercialf and transport vehicles, and on goods intended for use in the works to be carried out (Art. 16).

(e) Regime D, the establishment convention regime

93. This regime applies to enterprises launching projects of exceptional economic and social value to the country, and which require investment in excess of 150 million dobras (Art. 17). An establishment agreement is drawn

up between the investor and the State, setting out the obligations incumbent on each party. The State accepts no responsibility for losses sustained or profits foregone by investors owing to unfavourable trends in the national economy or in the economic sector concerned. Establishment agreements must include the following: a description of the developments to be carried out by the investors; the timetable for implementing the investment programmes; the advantages granted to the investor by the State; the arrangements for the State to monitor the project; and the arrangements for resolving differences of interpretation and settling disputes between the parties (Arts. 18 and 19).

4. Sanctions and dispute settlement

94. If enterprises fail to comply with the conditions, the Government may withdraw or modify the benefits. If a benefit is withdrawn and its effects can be precisely calculated, the sums already advanced must be repaid (Art. 23).

95. Disputes concerning the interpretation and application of the Code are to be resolved through conciliation and arbitration, according to the terms of the international obligations assumed by the State. Where there are no international obligations, or none which apply to the circumstances of the case, the dispute will be settled by an arbitration panel consisting of three members, one arbitrator being appointed by each of the parties, and the third being chosen by the other two (Art. 23).

F. SENEGAL

96. Act No. 87-25 of 1987 on the Investment Code has superseded the Investment Code of 1981 and Act No. 81-51 of 1981 on small and medium-sized enterprises (9). The purpose of the new Code is the same as that of 1981: to foster increased output and to improve productivity and employment opportunities. It introduces three significant new features: (a) authorization is automatically granted for the various investment regimes, subject to the criteria for eligibility; (b) the benefits granted are graduated; (c) the regimes applying both to large enterprises, and to medium-sized and small ones, are brought together in the same code. The Code lays down general provisions applicable to investments, and special provisions applicable to different kinds of investment regimes.

1. Definitions

97. Within the meaning of the Code, "natural or legal persons lawfully established in Senegal" are those who have satisfied the provisions of Senegalese law and the obligations with regard to residence permits and the practice of commercial or industrial activities. "Capital investment" is taken to mean contributions of capital and goods to enterprises established in Senegal, in exchange for partnership certificates or shares in the enterprises. Loans equivalent to shareholdings are also regarded as investments. However, loans granted by States or by foreign public bodies cannot be regarded as shareholdings within the meaning of the Code. The portion of undistributed profit which is re-invested is also regarded as investment (Article 3).

2. Scope

98. The Code applies to natural and legal persons, both nationals and foreigners, in respect of activities carried on in the economic sectors covered by the Code, or in respect of their shareholdings in Senegalese companies. The economic sectors covered by the Code are: agriculture, fishing, animal husbandry and related activities; manufacturing, whether through production or processing; the prospection, extraction and processing of minerals; tourism and the hotel industry; cultural activities; and service activities carried on by small or medium-sized enterprises (Articles 1 and 2).

3. General guarantees

99. Section 12 of the Constitution forbids expropriation, except for reasons of overriding public interest and subject to adequate compensation, the amount of which is fixed beforehand. The Code guarantees the free transfer of capital and returns on capital, provided the investment project is financed through convertible currency, and subject to exchange control regulations. The Code also guarantees equal treatment for nationals and foreigners, subject to the specific provisions applicable to foreign nationals. Nothing in the Code shall prevent the offering of additional guarantees and advantages, under agreements concluded by Senegal (Arts. 6 to 10).

4. Investment regimes

100. The Code establishes an ordinary regime and four special regimes for investments. These are: a regime for small and medium-sized enterprises; a regime for enterprises using local resources; a regime for enterprises engaged in technological innovation; and a regime for decentralised enterprises. The

priority objectives are defined as: the promotion of small and medium-sized enterprises; technological development and innovation; and the establishment of economic activities in the interior of the country. These regimes offer certain advantages, and in return, enterprises undertake to discharge certain obligations (Arts. 12 and 13).

a) Conditions applicable to the ordinary regime

101. Any enterprise engaged in one of the economic sectors covered by the Code, except for enterprises engaged in trading or in other activities eligible for particular codes, may receive the benefits of the ordinary investment regime. As regards the financing of the enterprise, in order to benefit from any of the regimes established by the Code, a project seeking authorization for the creation or expansion of an enterprise must be at least 20% self-financed, in the case of small and medium-sized enterprises, and 30% in the case of other enterprises. As for the conditions relating to employment, enterprises must inform the competent authorities of their targets for job creation and their plans for the training of nationals (Arts. 14 to 16).

b) Specific conditions for special regimes

102. Under the regime for small and medium-sized enterprises, the investment programme must amount to 5 million CFAF or more (10), or 200,000 CFAF or less. There must be at least three permanent salaried employees of Senegalese nationality (Art. 17). Under the regime for enterprises using local resources, the value of intermediate consumption of products of Senegalese origin must exceed 65% of the total value of intermediate consumption by the enterprise in a single tax year, and the value of imported intermediate goods consumed must be less than 65% of the total value of goods produced after processing in Senegal (Art. 18).

103. Under the regime for enterprises engaged in technological innovation, these enterprises must either invest a minimum percentage of their turnover in research, under a contract with a Senegalese research organization, or must carry out research in-house. The enterprise must submit an investment programme designed to utilize the research findings of a Senegalese organization or of an individual researcher (Art. 19).

104. Under the regime for decentralised enterprises, the country is divided into four zones. Zone A consists of the urban area of Dakar; Zone B comprises the remainder of the Dakar region and Thies; Zone C comprises the regions of Diourbel, Louga and Kaolack; Zone D consists of the regions of Fatick, Kola, Tambacounda, Ziguinchor and Saint Louis. The B, C and D zones are regarded as less-developed economically. According to the Code, a decentralised enterprise is any enterprise producing goods or services in which at least 90% of the staff work at locations outside Zone A. Apart from the obligations already mentioned, authorized enterprises must abide by their investment programmes, comply with the quality standards set for the goods and services they produce, keep accounts in conformity with the national accounting system, give priority in recruitment to Senegalese nationals with equal qualifications, and organize training and career progression for nationals within the enterprise (Arts. 10 and 11).

105. Authorized enterprises must abide by their investment programmes, comply with national and international quality standards, give priority in recruitment to Senegalese nationals with equal qualifications, and organize training for nationals within the enterprise (Art. 22).

c) Advantages

106. Every enterprise admitted to the ordinary regime enjoys the following advantages: exemption for the period of the investment project, and/or a longer period of not more than two years for small and medium-sized enterprises, and three years for others, from import duties on materials not produced or manufactured in Senegal which are intended for production or use; and exemption from turnover tax in accordance with Article 350 and Annex VI of the General Tax Code.

107. The particular advantages associated with the regime for small and medium-sized enterprises include: exemption from fees payable on company statutes, and from patent fees; exemption from the minimum flat-rate tax, exemption from employers' tax on salaries paid to Senegalese workers; a subsidy for job-creation, granted irrespective of the number of personnel; and a relaxation of the rules on dismissals on economic grounds.

108. The special advantages available to enterprises using local resources include: exemption from the minimum flat-rate tax and from patent fees for enterprises established in less-developed areas. Enterprises engaged in technological innovation may receive a rebate on the employers' tax ordinarily payable on salaries paid to Senegalese workers, the amount of the reduction being equivalent to the ratio between the sum invested and the turnover figure. In addition, any enterprise planning to utilize its research findings for investment purposes in Senegal will receive, for that purpose, the advantages available to small and medium-sized enterprises. Enterprises established in economically less-developed areas are exempt from the employers' flat-rate tax on salaries paid to Senegalese workers.

109. To afford authorized enterprises a greater degree of flexibility in their employment policies, they receive a subsidy for every job created after the 50th; this is done by allowing enterprises to retain the tax payable on salaries, and to offer fixed-term contracts for five years following the date of authorization.

110. The period for which an authorization for a special regime remains valid depends on the area in which the business is set up - 5 years for projects in Zone A, 7 years in Zone B, 10 years in Zone C and 12 years in Zone D. Exemption from tax and duty under the regimes for small and medium-sized enterprises, enterprises using local resouces and decentralised enterprises, is on a sliding scale for the last three years of the period of authorization: the advantages are reduced by 25% each year, and disappear completely at the end of the last year. The advantages granted to enterprises engaged in technological innovation are valid only for the fiscal year during which the investment is made. The period for which the advantages are granted cannot be extended.

5. Authorization procedure, sanctions and administrative authority

111. The grant of advantages associated with the various regimes is conditional upon the filing of an application for authorization with the Minister responsible for the sector concerned.

112. If an enterprise fails to comply with the prescribed obligations, or those which it has assumed, the benefits of the special regime may be wholly or partially withdrawn. The procedure for withdrawal is as follows: the minister responsible for granting the authorization calls upon the enterprise

to take the necessary steps. If no satisfactory response is forthcoming within 90 days, the minister institutes inquiries and may, on the basis of his findings, decide that all or part of the benefits of the special regime should be withdrawn. An appeal to stay the decision will have effect only if lodged, within 60 days, with the competent courts of Senegal.

113. The competent administrative authority is the Ministry responsible for granting the authorization. An Investor's Guide is available, summarizing the advantages available to investors.

6. Settlement of disputes

114. All disputes arising from the interpretation or application of the Investment Code will be resolved by the Courts of Senegal. However, disputes between a foreign national and the State are resolved by a conciliation or arbitration procedure, on the basis of an agreement between the two parties, or on the basis of agreements on the protection of investments between Senegal and the State of origin of the foreign national. Senegal has ratified the 1965 Convention on the settlement of investment disputes between States and nationals of other States. Senegal has also concluded investment protection agreements with Switzerland, the United States, the Federal Republic of Germany, Sweden, the Netherlands, the United Kingdom and Romania, among others.

7. Regime concerning the Dakar free zone

115. The regime concerning the Dakar free zone has been mentioned in the previous document. (11)

G. TOGO

116. In order to promote the development of the national economy, and to open up new prospects for investors, in 1985 Togo promulgated Act No. 85-02, on the amendment of the 1965 Investment Code, which had already been revised three times, in 1973 and in 1978 (12). In 1985 Togo also adopted Act No. 85-02 on the Charter for Togolese Enterprises, oriented towards Togolese entrepreneurs wishing to invest in the productive sector of the economy and to ensure the proper management of their enterprises, with or without foreign participation. The chief innovations in the new Code are: the documents which govern investment in Togo, now two in number; the 1985 Charter of Togolese Enterprises and the Investment Code; the newly-created Committee for the Promotion of Togolese Enterprises; and the combination of the two previous regimes within two authorization regimes, open to any entrepreneur making an investment of at least 300 million CFAF (13).

1. Scope

117. The Investment Code applies to companies lawfully established in Togo and engaged in farming, animal husbandry, fisheries or forestry, whether in processing activities or in the production of goods or services of recognized importance to the national economy, or engaged in the preservation or processing of vegetable or animal products, or in the manufacture or assembly of consumer goods. The Code does not apply to commercial enterprises whose main activity consists of purchasing products and merchandise for the purpose of reselling them in their original condition.

2. General conditions

118. In order to receive authorization, enterprises must also satisfy the following criteria: they must contribute to the achievement of economic and social development targets; at least 60% of their wages bill must be paid to Togolese nationals; at least a quarter of their investment must be self-financed; and the proportion of added value which they generate, after tax, must be equal to at least 40% of their turnover (this figure is subject to revision) (Arts. 1 and 9).

3. General guarantees

119. According to the Code, foreign natural and legal persons who have financed, or part-financed, an investment are guaranteed the right to transfer capital and income. This guarantee also extends to capital investments from whatever source, and to funds accruing from the transfer or winding-up of businesses.

120. Authorized enterprises are free to choose their own suppliers of goods and services. No legislative measures or regulations are applied which would result in imposing on foreign natural or legal persons terms for their operations or activities which are less favourable than those enjoyed by nationals, except for the provisions concerning enterprises laid down in the Charter of Togolese Enterprises (Arts. 2 and 3).

4. Investment regimes

121. The Code comprises two investment regimes: regime A, granted to enterprises making an investment of at least 300 million CFAF; and regime B, open to enterprises making an investment of at least 3 billion CFAF (Art. 9).

(a) Authorization procedure

122. Requests for authorization must be submitted to the Planning Ministry. Applications are examined by the Department of Planning and Development, which provides secretariat services for the National Investment Committee. Applications must be accompanied by supporting documentation. For this purpose, the Planning Ministry has published instructions for the submission of applications for authorization, which stipulate that 25 copies of the file must be submitted, together with additional files containing information on the enterprise, the applicant, the projected product and its markets, the industry plan, the financing of the project and the profitability of the enterprise (Arts. 5, 6, 7 and 8).

123. Following the submission of an application, notification of authorization will be given within three months for regime A, and six months for regime B. The enterprise has three years after notification to proceed with the project. If there is an establishment convention, this time-limit may be extended (Art. 5).

b) General advantages

124. The advantages common to both special regimes are: tax exemption for plant and machinery and raw materials; exemption, for products manufactured by an authorized enterprise, from export duties and from the flat-rate tax on transit for export; a temporary exemption from corporation tax; a reduction of wages tax from 7 to 2% for the first five tax years; a 50% reduction in registration duties; and, where territorial taxes are concerned, subject to certain conditions on the protection of water and the environment, no tax is payable on the discharge of water into rivers (Arts. 10 to 17).

125. In addition, enterprises established in Togo which invest in further reconversion or restructuring, to an amount in excess of 100 million CFAF, or below 300 million CFAF, may be exempted from customs duties for two years, subject to approval by the National Investment Committee (Art. 23). These enterprises may also request the advantages and guarantees available under the Investment Code for the purpose of expansion, reconversion or restructuring, where the planned investment is equal to, or in excess of, 300 million CFAF (Art. 24).

(c) Special advantages

126. Enterprises covered by regime A are exempt from duty on the entry of goods and from the flat-rate tax on transactions and on capital goods, for a period of three years, and from duty on spare parts for five years. Duty is payable on raw materials and consumables at rates varying from year to year, and on exports according to the advantages common to both regimes. These enterprises are also exempt from corporation tax and from the minimum flat-rate tax, according to their area of operations, and they receive a reduction on wages tax (art. 18).

127. In addition, agricultural and agro-industrial enterprises authorized under the A regime are granted relief from corporation tax and from the minimum flat-rate tax, at a rate and for a period which varies according to their area of operations (Art. 22).

128. In addition to the advantages available under the A regime, enterprises benefitting from the B regime enjoy tax equalization and recognized legal status and may, if they wish, negotiate an establishment convention with the State, setting out the duration and commitments of the enterprise and the guarantees offered (Arts. 19 and 20).

5. The Charter of Togolese Enterprises

129. The Charter of Togolese Enterprises establishes a regime in favour of small and medium-sized enterprises. The benefits of this regime are available to enterprises with total investments equal in value to at least 5 million CFAF, or less than 3 million CFAF. Beyond this limit, the provisions of the Investment Code apply. The activities carried on by these enterprises must be in one of the following economic sectors: farming; animal husbandry; fisheries; forestry; industrial processing or assembly; public works and public services; or craft industries. In addition, the majority of share capital must be held by nationals; the enterprises must be managed by Togolese nationals, and their head offices must be in Togo (Arts. 1 and 2).

130. Enterprises which fulfil the conditions laid down in the Charter may receive tax exemption or rebates, and rebates on special levies, on imports of machinery and equipment needed for their operations, as well as exemption from export taxes and duties (Arts. 3 to 13).

131. As regards the protection of minority foreign shareholdings in Togolese enterprises, the State guarantees the right to transfer foreign capital which has shelped to finance investment in the authorized enterprises. This guarantee is subject to exchange controls and to the international agreements signed by Togo (Art. 14).

6. Administrative authority

132. The Code establishes the National Investment Committee, an organ for the promotion, study and monitoring of investment projects, which is also required to give its views on the granting of authorization to enterprises.

133. The Charter of Togolese Enterprises establishes the Committee for the Promotion of Togolese Enterprises, whose activities include support for the authorized enterprises.

7. Sanctions and disputes settlement

134. If the investor fails to comply with the obligations laid down in the Code and in the Charter, or does not execute the initial investment programme within the specified time-limit, the authorization may be suspended or withdrawn (Art. 8).

135. Any dispute arising between the investor and the State in connection with one or more clauses of the Investment Code will be resolved a l'amiable. If no agreement is reached, the dispute will be referred to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) (Art. 4).

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NOTES

1) UNCTAD/ST/ECDC/30 (Part I), entitled "Regulation of foreign investments in Africa; Systematic presentation by country", 6 August 1986; UNCTAD/ST/ECDC/30/Add. 1 (Part I), entitled "Regulation of foreign investments in Africa; Systematic presentation by country", 8 April 1987; UNCTAD/ST/ECDC/30 (Part II), entitled "Foreign investmen regulations in Africa: Texts arranged by subject", 15 October 1986.

2) Resolution 1 (I) - Report of the Committee on economic co-operation among developing countries, first session, 7 and 8 February and 2 - 9 May 1977; Resolution 3 (IV), Report of the Committee on economic co-operation among developing countries, fourth session, 18-29 November 1985; Report of the Committee on economic co-operation among developing countries, fifth session, 1 - 12 June 1989, Resolution (V).

3) UNCTAD/ST/ECDC/42 (Part I): "Regulation of foreign investment in Arab countries".

4) UNCTAD/ST/ECDC/43 (Part I): "Regulation of foreign investment in Asia".

5) UNCTAD/ST/ECDC/43, paragraphs 148 - 153.

6) On 31 December 1988, 1 United States dollar was worth 299.59 Guinean francs.

7) On 31 December 1988, 1 United States dollar was worth 625.33 meticais.

8) On 31 December 1988, 1 United States dollar was worth 67.555 dobras.

9) UNCTAD/ST/ECDC/30, paragraphs 296 - 229.

10) On 31 December 1988, 1 United States dollar was worth 302.95 CFA Francs.

11) UNCTAD/ST/ECDC/30, paragraphs 224 - 226.

12) UNCTAD/ST/ECDC/30, paragraphs 230 - 245.

13) On 31 December 1988, 1 United States dollar was worth 302.95 CFA Francs.